

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ROBERT A. YOUNGMAN**

Claimant

VS.

**EXCEL CORPORATION**

Respondent

Self-Insured

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Docket No. 220,749

**ORDER**

Respondent appealed the preliminary hearing Order of Administrative Law Judge Kenneth S. Johnson contained in the transcript of the preliminary hearing held on July 8, 1997.

**ISSUES**

Respondent raised the following issues for Appeals Board review:

- (1) Whether claimant suffered an accidental injury that arose out of and in the course of his employment.
- (2) Whether claimant gave respondent timely notice of the accident.
- (3) Whether claimant served upon respondent a timely written claim for compensation.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the brief of the respondent, the Appeals Board finds as follows:

All three issues raised by the respondent are jurisdictional issues listed in K.S.A. 44-534a, as amended, that grant the Appeals Board review of a preliminary hearing order.

(1) Claimant claims he injured his left shoulder while performing his regular repetitive work activities for the respondent from August 1, 1996, through February 24, 1997. The job claimant was performing during this period of accident was hanging trolleys. The trolleys were required to be hung on a conveyor chain to transport the meat from the kill floor to the hot boxes and then to fabrication. The job required claimant to use both hands pushing and pulling above shoulder level.

Claimant testified his left shoulder became symptomatic sometime around the last of July 1996 or the first of August 1996. The medical records of claimant's family physician, Merrill R. Conant, M.D., indicated claimant complained to him during an examination on July 18, 1996, of left shoulder pain. That medical note indicated claimant had a "long history of left shoulder pain which hurts in abduction and with some work activity." Dr. Conant referred claimant to orthopedic surgeon Guillermo E. Garcia, M.D., who saw claimant for the first time on September 6, 1996.

Dr. Garcia had claimant undergo an MRI examination that found an incomplete rotator cuff tear. The doctor treated claimant conservatively with injections, medication, and physical therapy. During this period of treatment, claimant continued to perform his regular work and claimant testified that his shoulder pain worsened. Finally, on February 25, 1997, Dr. Garcia performed an arthroscopic examination of claimant's left shoulder with debridement and AC arthroplasty. At the time claimant was admitted for surgery, he gave a history that his left shoulder had given him problems while he was working.

Following the surgery, claimant was taken off work and placed in physical therapy. He was released to return to regular work by Dr. Garcia on April 14, 1997. At the time of the preliminary hearing, July 8, 1997, claimant continued to work for the respondent but had changed to a different job.

The Administrative Law Judge found claimant had met his burden of proving that his left shoulder injury was work related. The respondent, however, argues that claimant did not present competent evidence at the preliminary hearing that proved his work caused his left shoulder injury. Specifically, respondent argues that neither the claimant nor his treating physician, Dr. Garcia, related claimant's left shoulder problems to his work. In fact, until Dr. Garcia recommended surgery to correct claimant's left shoulder problem claimant had not made a claim for workers compensation.

Claimant testified that when his left shoulder first became symptomatic he did not know what was the actual cause of the problem. He testified that he did not make a claim for compensation at that time upon respondent because his initial reaction was that it was an arthritic condition. However, because the symptoms increased while he was working, he finally decided that his work activities were the cause of the symptoms.

The Appeals Board finds that the preliminary hearing record which includes claimant's testimony and his medical treatment records support the Administrative Law Judge's decision that claimant's work activities caused his left shoulder injury. Thus, the Appeals Board affirms the Administrative Law Judge's decision on this issue.

(2) Respondent argues that the date claimant suffered his left shoulder injury was on or about August 1, 1996. This was the date the medical records indicate that claimant first complained of the injury. Therefore, respondent asserts that the first knowledge that respondent had that claimant was claiming a work-related injury was on February 21, 1997, when the respondent was served with a demand letter from claimant's attorney for workers compensation benefits. Therefore, respondent argues that claimant failed to give respondent timely notice of accident within 10 days and more than 75 days elapsed for the claimant to show just cause for failing to give the timely notice of accident as required by K.S.A. 44-520.

The Administrative Law Judge found that claimant proved his everyday repetitive work activities had caused his left shoulder injury. Accordingly, the Administrative Law Judge found that claimant's appropriate date of accident was the last day that he worked before his surgery, that was performed on February 25, 1997. See Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). Therefore, the respondent received notice of accident on February 21, 1997, which is within the statutory required ten days. The Appeals Board concludes the Administrative Law Judge's decision on the timely notice issue should be affirmed.

(3) Respondent further argues that claimant's request for compensation benefits is barred because claimant failed to serve respondent with a timely written claim for compensation within 200 days of August 1, 1996. As found previously, claimant's appropriate date of accident was February 24, 1997, his last day worked before surgery. Claimant served respondent with a written demand for compensation on February 21, 1997. Therefore, claimant met the 200-day requirement contained in K.S.A. 44-520a. The Appeals Board also affirms the Administrative Law Judge in reference to this issue.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Kenneth S. Johnson contained in the transcript of the preliminary hearing held on July 8, 1997, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1997.

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BOARD MEMBER

c: Chris A. Clements, Wichita, KS  
D. Shane Bangerter, Dodge City, KS  
Kenneth S. Johnson, Administrative Law Judge  
Philip S. Harness, Director